92-1579

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BOBBY GLEN GARRETT AND
ROBERT TILLMAN,

PETITIONERS

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A. Sufficiency of the Evidence

The Eleventh Circuit's affirmance of Petitioners' conspiracy convictions based on the sufficiency of the evidence, when measured against the facts even most favorable to the government, was based on the Panel's belief of the independent and individual guilt of each Petitioner in the sale of drugs, rather than the law of the Eleventh Circuit and sister circuits regarding the elements of conspiracy.

B. Burden of Proof at Sentencing Inadequate in Guideline Cases

Whether application of the Sentencing Guidelines is unconstitutional as applied in Petitioners' cases as related to the burden of proof at sentencing specifically as relates to drug quantities? The present burden of proof used in guideline sentencing is a preponderance of the evidence. This is insufficient since these very sentencing

factors which may be proved by a preponderance of the evidence may cause an overwhelming enhancement of a criminal defendant's punishment. The guidelines most marked increase in punishment from the old law punishment is in the area of drug quantities.

THE PARTIES

The caption in this case contains the name of all parties.

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REFERENCE TO OPINIONS DELIVERED BELOW

1. The United States Court of Appeals for the Eleventh Circuit issued a two-page unpublished written opinion affirming the Petitioners' convictions and sentences on September 10, 1992, attached as Appendix "A".

2. The United States Court of Appeals for the Eleventh Circuit issued an order denying rehearing and rehearing en banc on December 22, 1992, attached as Appendix "B".

JURISDICTION

On September 10, 1992, the United States Court of Appeals for the Eleventh Circuit affirmed the convictions and sentences of Petitioners' Garrett and Tillman upholding the prior rulings of the United States District Court for the Northern District of Georgia. On December 22, 1992, the United States Court of Appeals denied Petitioner's Suggestions for Rehearing\Rehearing En Banc. This Petition is

filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 13, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

TITLE 21 U.S.C. 841, SET OUT AT APPENDIX C

TITLE 21 U.S.C. 846, SET OUT AT APPENDIX D

STATEMENT OF THE CASE

These cases were consolidated for trial and appeal.

On March 20, 1990, Robert Tillman and Bobby Glen Garrett were charged in a one-count indictment for conspiracy to distribute in excess of 100 grams of methamphetamine pursuant to 21 U.S.C. 846. (R1-1,2,-1). On September 14, 1990, the jury returned a verdict of guilty (R6-570) (R1-37-1).

On February 4, 1991: Mr. Tillman was sentenced to 20 years imprisonment, $20,000 fine, $50.00 special assessment, and 3 years supervised release with additional conditions; and Mr. Garrett was sentenced to 31 years imprisonment, $30,000 fine, $50.00 special assessment, and 3 years supervised release with additional conditions. (R1-56,57-1).

On February 14, 1991, Mr. Tillman and Mr. Garrett filed notice of appeal. (R1-59,60-1).

The pertinent facts will be incorporated into the respective issues.

ARGUMENT

(I) Introduction

There should be no differential application of well-settled law regarding the elements necessary to establish a conspiracy simply because there may be evidence that a defendant had independently sold drugs. In addition, one's punishment should not be equivalent to life in prison without parole based on consideration of sentencing factors established by a mere preponderance of the evidence when these factors alone overwhelm the sentence.

This case provides for the Court an opportunity and an obligation to send a message throughout the courts of this land that people may not be deprived of liberty based on gut feelings and speculation and face

enhanced penalties based on application of a burden of proof no greater than one required in an automobile negligence case, simply because the case involves drugs.

II. Facts

Garrett and Tillman were charged in a one-count indictment with conspiracy to distribute in excess of 100 grams of methamphetamine pursuant to 21 U.S.C. Section 846.

Essentially, the government's case against Petitioners as charged in the indictment was as follows:

> "Between on or about July of 1987 and March of 1989, in the Northern District of Georgia, the defendants, ROBERT TILLMAN and BOBBY GLENN GARRETT did combine, conspire, confederate and agree and have a tacit understanding with one another and with others not named as defendants herein, that they would commit an offense defined in Section 841(a)(1) o Title 21 of the United States Code, to wit, that they would unlawfully, knowingly and intentionally distribute in excess

> of 100 grams of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 846."

The evidence should be viewed in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 62, S.Ct. 457, 86 L.Ed. 680 (1942).

The evidence at trial in this case was less than adequate to prove a conspiracy. In viewing the evidence in the light most favorable to the Government there were only two (2) government witnesses who testified concerning any conceivable link between Garrett and Tillman: Marge Herron and Sharon Newsome. The testimony of Marge Herron sheds no light on a conspiracy between Tillman and Garrett. In fact the testimony of Marge Herron shows that she was an independent dealer of methamphetamine (also referred to as speed. (R3-80). Ms. Herron testified that she was contacted by Ralph Turner to obtain

speed for Robert Tillman. She testified that she obtained the speed from Mr. Garrett. She also testified that at no time did she tell Mr. Garrett that the drugs were for Mr. Tillman At no time did Ms. Herron make any kind of arrangement between Mr. Tillman and Mr. Garrett. (R3-47). In fact, she testified that she would take some of the drugs out of what she would receive from Garrett before she would sell it to Tillman. Ms. Herron would purchase the speed from Garrett for one price and then sell the speed to Mr. Tillman for a different price thereby making a profit on each transaction. (R3-83,88). She also dealt drugs with other people. Ms. Herron also testified that she was the one who set the price for drugs that were sold to Mr. Tillman and it was not Mr. Garrett. (R3-45 thru 88).

Sharon Newsome was the only other witness to substantively testify about drugs and

attempt to link Garrett with Tillman in illicit drug dealing. Ms. Newsome's attempt failed. The insufficiency of her testimony in establishing the existence of a conspiracy is apparent as noted:

(1) Sharon Newsome testified that Robert Tillman asked her if she could get two pounds from Bobby Garrett. (R3-122).

(2) Sharon Newsome testified that she did not know if Garrett and Tillman had ever met. (R3-126).

(3) Newsome said that Ralph Turner obtained methamphetamine from Marge Herron to show it to Robert Tillman because he wanted to start selling to Tillman. (R3-157).

(4) She testified that Marge Herron never told Turner where she was getting her drugs. (R3-198).

(5) She indicates that Garrett sold to Tillman twice through a Grady Wike. (R3-101

thru 108).

At no time did Sharon Newsome's testimony reveal any agreement between Tillman and Garrett regarding the sale of drugs. In fact, her testimony reveals the contrary.

The only other witness providing drug-related testimony was Grady Wike, Jr. However, Grady Wike, Jr. only testifies about Garrett and not Tillman. He admitted that he never personally obtained methamphetamine from Garrett although he believed it as Garrett. (R4-228,232).

Thomas Kirven, am employee of Public Storage in Georgia, testified about records belonging to Herron and Tillman with no mention of Garrett. (R4-294).

III. Sufficiency of the Evidence

The Court in Ingram v. United States, 360 U.S. 672, 680, 79 S.Ct. 1314, 1320, 3 L.Ed.2d 1503 (1959), cautioned, "charges of conspiracy

are not to be made out by piling inference upon inference."

From the evidence presented there was no proof that any conspiracy among anyone existed, that the only evidence presented was that of a buyer-seller relationship which, standing alone, is insufficient to support a conspiracy conviction. United States v. Townsend, 924 F.2d 1385, (7th Cir. 1991). As stated earlier a mere association with persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy. Unites States v. Rozen, 600 F.2d 494, (5th Cir. 1979). The only evidence presented by the Government was speculation concerning involvement in a conspiracy and juries cannot be permitted to convict on speculation or suspicion. Rozen, supra. It is not enough for it merely to establish a climate of activity that reeks of something

foul. United States v. Wiesehenberg, 604 F.2d 326, 331-32 (5th Cir. 1978).

The Eleventh Circuit obviously relied on the government's assertion that Garrett and Tillman may still be guilty of a conspiracy regardless of whether or not they have ever talked and that culpability should be impugned against them because their independent successes were contingent on the success of the other. This position, however, does not meet the substantial evidence standard espoused by the predecessor of the Eleventh Circuit as noted in United States v. Malatesta, 590 F.2d 1379 (5th Cir. 1979).

At best, the government's evidence presented a mere buyer/seller relationship which showed nothing with regard to the entering of an agreement. The government's assertion, which must have been adopted by the Eleventh Circuit, that the relative success of

Garrett's operation and Tillman's operation was dependent upon the independent successes of the other is not supported by the record.

Where a single conspiracy has been alleged, a variance of proof occurs if the evidence shows merely multiple conspiracies. The variance doctrine is designed to protect a defendant's right "not to be tried en masse for the conglomeration of distinct and separate offenses committed by others." Kotteakos v. United States, 750 U.S., 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Should not this principle also apply in cases of a single conspiracy count when the evidence, at best, only shows a conglomeration of distinct and separate offenses committed by each defendant?

Contrary to the government's contention that the length of a buyer/seller relationship, the volume of the transactions, and the fact that the purchase money provided

by Tillman in exchange for drugs may have been used by Garrett to fund some of his purchases this still does nothing more than suggest a buyer/seller relationship.

The cases the government cited in support of its position and those upon which the Eleventh Circuit Panel apparently relied[1], were distinguishable from the case at bar.

This was not a case where the Court was left to interpret that by circumstantial evidence the Petitioners knew or should have known of the existence of a plan or scheme. Instead, in this case the evidence is clear that Petitioners did not know one another (R3-126); did not talk to one another (R3-87); did not enter an agreement with one another (R3-47); and that Heron is the one who set the

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[1]The two-page written opinion of the Eleventh Circuit hearing panel provided only two case cites, neither of which specifically addressed or dealt with the sufficiency argument or were meant to by the panel.

price of the drugs sold to Tillman (R3-88).

> ...The liability of members of the distribution chain is predicated upon the notion that participants at different levels in the chain know that the success of those at each level hinges upon the success of the others and therefore cooperate for their mutual benefit. Only if "the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers," id., will the inference of knowledge and benefit be valid." United States v. Townsend, 924 F.2d 1385, 1390 (7th Cir. 1991). (Emphasis added).

There was no evidence in the case at bar that was contrary to the proposition that Garrett could have been the "engine" (original source of the drugs) and Tillman the "caboose" (the ultimate user). The amount of the drugs cannot be sufficient to establish a member's intent and knowledge in a conspiracy to distribute. United States v. Laughman, 618 F.2d 1074 (4th Cir. 1990); United States v. Watkins, 662 F.2d 1097 (4th Cir. 1981).

As the Second Circuit noted in United States v. Borelli, 336 F.2d 376, 383 (2d Cir.) (Friendly, J.) cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1964), "it is a great deal harder to tell just what agreement can reasonably be inferred from the purchase, even repeated purchase, or contraband by definition, market transactions - whether in legal or illegal markets - benefit both parties, but we do not assume, ab initio, that they carry with them the excess baggage of conspiracy." Townsend, supra, at 1392.

The Seventh Circuit, in an earlier case, United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), citing United States v. Ford, 324 F.2d 950 (7th Cir. 1963), identified the buyer/seller relationship very clearly as noted below:

> The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a

> conspiracy to sell, receive, barter or dispose of [stolen property] although both parties know of the stolen character of the goods. In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective.

In the case at bar, there was no evidence that Garrett and Tillman even knew that one was the buyer and the other the seller, much less having an understanding or agreement regarding the same. In fact, Marge Heron did not tell Garrett who the drugs were for. (R3-47).

The evidence may have been (arguendo) sufficient to convict either of the Petitioners individually of drug sales but was insufficient to convict them of conspiracy. If the Eleventh Circuit Panel had followed the standards of the circuit and those suggested in sister circuits (as cited in the briefs), the respective convictions would have been overturned and the Petitioners released from

prison. The conspiratorial net has been cast too wide in this case. Our nations's hysteria over the sale of illicit drugs in this country mandates intervention by this Court to send message that everyone is entitled to equal justice under the law. Justice should not be expended according to the offense of conviction. Probably had there been other less drastic options for the jury than a free pass for Petitioners, an insufficiency finding may have issued as to Count I based on the evidence and a sufficiency finding on a charge of individual possession with intent to distribute. These Petitioners were charged, however, in only one count, and this was conspiracy.

Jurys are not infallible nor are Circuit Court Panels. The Fourth Circuit in United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991), recently addressed jury verdicts. The

principle espoused in Dunnigan, supra, may be applied in the instant case. This is noted as follows:

> "We who have been schooled and immersed in our system of law are perhaps too quick to make the jury an infallible icon and a witness' oath a sacred rite; we ignore the human infirmities that flaw both. In short, our love of our system easily produces a chauvinistic faith in its perfection.
>
> ....

In addition, the Honorable Judge Parker, Chief Judge, Eastern District of Texas, sitting on a Panel at the Fifth Circuit Court of Appeals, in United States v. Melancon, 972 F.2d 566 (5th Cir. 1992), in a specially concurring opinion, noted:

> 'It matters not that this is a drug case. It matters not that this (attempted) appeal may well be without merit on its substantive points. It matters that we take care to see that the so called "war on drugs" not count among its casualties constitutional integrity.'

If the Eleventh Circuit's opinion stands regarding the conspiracy conviction, the implied reasoning that will result is there never could be a drug case where each person in the importation/distribution process would not be a co-conspirator with the other.

Even if these men are guilty of being drug dealers (arguendo) they are not guilty of conspiracy with each other or others and, therefore, their convictions should be reversed. The safeguards provided by the constitution are enforceable even if it means freeing the guilty to protect us all. This is true even if the case involved drugs.

IV. Burden of Proof at Sentencing Inadequate in Guideline Cases.

Petitioners contend that the factors that have been used to enhance their punishment, including but not limited to, drug quantity for both, through the Court's preponderance of the evidence analysis, is insufficient and

unconstitutional, mandating resentencing.

The Eleventh Circuit, as well as others, have held that the preponderance of the evidence standard satisfies due process even when factors tend to aggravate the sentence. See United States v. Madkour, 930 F.2d 234 (2d Cir. 1991); United States v. Cross, 916 F.2d 622 (11th Cir. 1990) (per curiam), cert. denied, ___ U.S.___ 111 S.Ct. 1331, 113 L.Ed.2d 263 (1991); United States v. McNeese, 901 F.2d 585 (7th Cir. 1990); United States v. Jenkins, 866 F.2d 331 (10th Cir. 1989); United States v. Kinsey, 843 F.2d 383 (9th Cir. 1988), cert. denied, 487 U.S. 1223, 108 S.Ct. 2882, 101 L.Ed.2d 916 (1988); United States v. Gibbs, 813 F.2d 596 (3d Cir. 1987), cert. denied, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987); United States v. Wood, 834 F.2d 1382 (8th Cir. 1987); United States v. Hodges, 935 F.2d 766 (6th Cir. 1991).

Some Courts, however, have noted that the enhanced punishment mandated by the guidelines warrant a stricter standard of proof, if not as a matter of law, as a matter of policy. United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989).

In further support of this position, Petitioners rely on comments made by the Courts in United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990), and United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990), wherein it was stated that even though the preponderance of the evidence standard satisfied constitutional requirements, a higher standard of proof can be mandated on policy or other grounds.

The Eighth Circuit, in United States v. Burks, 934 F.2d 148 (8th Cir. 1991), suggested that a higher standard, clear and convincing evidence, is mandated when the evidence is

speculative, tenuous, exaggerated, and minute.

The Sixth Circuit, in a very poignant opinion in United States v. Rigsby, 943 F.2d 631 (6th Cir.1991), articulated the apparent injustice in judicial determinations on quantities at sentencing, although refusing to reverse citing that it was bound by the law of the Circuit.

The Rigsby Court, in dicta, noted its disapproval with the previously cited cases of numerous Circuits as well as its own by stating:

> "We believe that a judicial determination of quantity under Section 841 at sentencing offends one of our most fundamental principles of justice.
>
> ....
>
> Sentencing serves the discrete purpose of determining an appropriate *level of punishment* for the crime of which the defendant has been found guilty. Therefore, substantial factual issues which measure the extent of the criminal activity should not generally be

determined at sentencing.

....

The underlying assumption is that those categories are determined prior to sentencing. In addition, judicial determination of quantity under Section 841 restores broad discretion in the district judge.

....

Because quantity under Section 841 is such an important and disputable factual issue, it should be determined by the jury. Judicial determination of quantity under Section 841 at sentencing undermines the function of the jury.

....

We believe that the rule as it now stands seriously reduces the jury's function and empowers the district judge to make one of the most critical factual determinations regarding the defendant's culpability. We cannot support this result.

....

For these reasons, we note our disapproval of and disagreement with the above cases, which hold that the quantity of drugs involved in a Section 841 offense must be determined by the district court at

> sentencing applying the preponderance of the evidence standard. Unfortunately, we are bound by this law and must affirm the district court's determination in the instant case."

Petitioners submit that based on the reasoning in Rigsby, supra, and that inferred in sister circuits, that Petitioners' cases should be remanded for resentencing at which time the issue of quantity should be submitted on a higher burden of proof than the preponderance standard. This Court is urged to refuse to perpetuate this fundamental injustice by adopting a stricter standard of proof when these certain sentencing factors are the tail that wags the dog. The risk that is run was noted by the Seventh Circuit in United States v. Ebbole, 917 F.2d 1495, 1501-02 (7th Cir. 1990), wherein it was stated:

> "We are not insensitive to the possibility that prosecutors may be tempted to expand conspiracy liability by bringing in new evidence under the less onerous

burden of proof that prevails at sentencing."

The Due Process Clause of the United States Constitution commands that Congress may not require that any person be incarcerated for a fixed period directly attributable to a specific fact determination unless there is proof beyond a reasonable doubt. In Re: Winship, 397 U.S. 358, 364, 89 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

There is no area of the law where a higher degree of certainty is required than in a determination of facts upon which an individual is to be deprived of personal liberty. The fact that the Court must decide numerous questions of fact based upon information which is often, by necessity sparse, biased or otherwise inadequate, and the absence from the guidelines of a fixed standard of proof for the factors that affect the length of sentence, is evidence that the

guidelines are violative of individuals' rights to due process. This particular issue was not addressed in United States v. Mistretta, 109 S.Ct. 647, 648-49, 102 L.Ed.2d 714 (1989). In this case there is absolutely no way to know what quantity of drugs the jury believed beyond a reasonable doubt were attributable to Petitioners. The only way to have known for sure would have been through the use of special verdict forms by the jury. When the information sought is relevant to the sentence which may be imposed, use of a special verdict form has been upheld. United States v. Orozco-Prada, 732 F.2d 1076, 1084 (2nd Cir. 1984); United States v. Murray, 618 F.2d 892, 895 n.3 (2nd Cir. 1980); United States v. Stassi, 544 F.2d 579, 583-84 (2nd Cir. 1976), cert. den., 430 U.S. 907, 97 S.Ct. 1176, 51 L.Ed.2d 582 (1977).

Evidence of the need for a heightened

burden of proof is revealed in the pertinent facts presented at Petitioners' sentencing to establish drug quantities for which each Petitioner was to be held accountable.

In a very well-reasoned dissenting opinion in United States v. Miller, 910 F.2d 1321 (6th Cir. 1990), Chief Judge Merritt, concerned over punishing criminal defendants without due process of law, held that "If the government wants to imprison the [defendant] for a sale of [1,169.5] grams of cocaine, it must charge, try and convict him of that offense and establish its proof beyond a reasonable doubt, or have him validly waive his rights and plead guilty to the charge. To do anything less violates due process of law."

A conspiracy to distribute drugs is an agreement to distribute drugs, and under the guidelines a defendant must be sentenced on the basis of all drugs that were distributed

pursuant to that agreement, whether or not he was personally responsible for distributing them or knew about their distribution. It is critical, therefore, to determine the scope of a defendant's agreement; the scope of an agreement determines the scope of a conspiracy, which in turn determines the scope of derivative liability under the guidelines. United States v. Sergio, 934 F.2d 875 (7th Cir. 1991).

The Court must determine the scope of each defendant's agreement in order to accurately calculate the quantity of drugs reasonably foreseeable. United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991). This was not done in the instant case and, therefore, constitutes error.

In the instant case the trial court judge gave conclusions rather than reasons as to why he held the defendants accountable for certain

quantities of drugs. This is insufficient. "Reasons" means something more than conclusions - a distinction important not only to the defendant whose future is at stake but also to the appellate process. United States v. White, 888 F.2d at 495 (7th Cir. 1998). As a result, these sentences are due to be reversed.

CONCLUSION

This case presents for this Court an opportunity to use its supervisory power to ensure that this nation's courts apply the correct standards of justice in conspiracy uses. It also affords the Court an opportunity to require a more stringent burden of proof for sentencing factors used to enhance punishment under the guidelines. Petitioners are requesting that certiorari be granted in the instant case because the issues raised herein are of such importance that

failure to grant certiorari will serve only to perpetuate the existence of disparity between criminal defendants depending on the offense charged, and denies due process since the burden of proof on sentencing factors remains a preponderance of the evidence.

This case has far-reaching implications for the future of criminal defendants, and it is respectfully suggested that this Court grant certiorari.

Dated this 19TH day of March, 1993.

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